**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**UNITED STATES OF AMERICA**

**v.** **Case No. 8:03-CR-77-T-30TBM**

**HATIM NAJI FARIZ**
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**MOTION TO QUASH SECTION(b) OF PARAGRAPH 26 AND EXTORTION ALLEGATIONS IN COUNTS 12-16 AND 18-21 AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatim Naji Fariz, by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12, hereby respectfully requests that this Honorable Court quash paragraph 26(b) of the Superseding Indictment and the subsequent extortion allegations contained in Counts 12-16 and 18-21 of the Superseding Indictment. As grounds in support, Mr. Fariz states:

## I. Introduction

On October 3, 2003, Mr. Fariz filed his motion to quash paragraph 26(b) of the Indictment for failure to state a legal basis for relief. (Doc. 302). On March 12, 2004, this Court granted the motion. (Doc. 479 at 57-60). Specifically, based on the Supreme Court's decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court determined that "extortion" as a racketeering activity means actions in which defendants obtain or attempt to obtain property or a thing of value. The Court indicated that its review of the Indictment revealed only one paragraph (Paragraph 29) in which there is

even an attempt to allege that the Palestinian Islamic Jihad (PIJ) obtained or attempted to obtain property, and that Paragraph 29 never alleges that any of the current owners of the property or thing of value would lose title to that property. The Court therefore determined that this allegation was insufficient to allege that something of value was sought to be extorted. Accordingly, the Court granted Mr. Fariz's motion to quash 26(b) from the Indictment.

On June 8, 2004, Mr. Fariz moved to quash the extortion allegations in Counts 35-38 and 40-44 of the Indictment, i.e., those Counts that alleged violations of the Travel Act against Mr. Fariz. (Doc. 549). On August 4, 2004, this Court granted Mr. Fariz's motion to quash the extortion allegations in the original Counts referenced above. (Doc. 593 at 5-6). On September 21, 2004, the government filed its Superseding Indictment in this matter, re-alleging in Paragraph 26(b) "multiple acts involving extortion in violation of Florida Statues 836.05, 777.011 and 777.04" as a vehicle for proving the predicate acts necessary to support a RICO conspiracy under 18 U.S.C. § 1962(d). (Doc. 636 at 9-11). Counts 12-16 and 18-21 of the Superseding Indictment allege violations by Mr. Fariz of the Travel Act, 18 U.S.C. §§ 1952(a)(2) and (a)(3), involving, *inter alia*, extortion as part of the underlying "unlawful activity."

**II. Memorandum of Law**

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense

charged. Furthermore, an indictment must contain every element of the charged offense to pass constitutional muster. *United States v. Fern*, 155 F.3d 1318 (11th Cir. 1998).

**A. Paragraph 26(b)**

Paragraph 29 of the Superseding Indictment spells out the government's theory of extortion in this case:

> The enterprise members would and did, by verbal and written communications, maliciously threaten injury to persons, namely, the inhabitants of the State of Israel and individuals and entities owning land in the State of Israel, with the intent thereby to obtain from such persons, certain property, namely, the physical land located within the State of Israel.

Paragraph 29 also alleges 14 actual instances of the threats supposedly made in support of the above extortionate scheme. Even in its new form, however, the government's attempt to introduce extortion as evidence of racketeering activity sufficient to establish a RICO conspiracy must fail.

As an initial matter, the PIJ, one of many Palestinian political factions, cannot take legal title to the land comprising the state of Israel. There are no allegations in the Superseding Indictment that can overcome this infirmity. Also, while the new version of Paragraph 29 contains allegations that defendants attempted to obtain property, "namely, the physical land located within the State of Israel," the government cannot properly allege the legal impossibility that defendants can take legal title to Israel as a sovereign state.

In its original opinion, this Court held that:

> Paragraph 29 never alleges that any of the current owners of the real estate (or the property or thing of value that is allegedly being extorted) in any way lose title to that real estate. What the PIJ attempted to extort according to

> Paragraph 29 is Israeli sovereignty over property between the Jordan River and the Mediterranean Sea. In light of *Scheidler*, this Court is in serious doubt whether such an intangible right is capable of being extorted. 537 U.S. 410-11, 123 S.Ct. 1069 (Stevens, J., dissenting) (stating that the majority opinion construed extortion to cover nothing more than acquisition of tangible property). Sovereignty is even more of an amorphous concept than the alleged property rights, the rights to receive and perform medical services, in *Scheidler*. Further, while undoubtedly sovereignty has "value" in some sense of that word, sovereignty does not have value in the economic sense that is used in extortion statutes. Because the Indictment fails to allege that the Israel or any other person lost or could have lost anything of value, this Court grants defendants' motion.

*United States v. Al-Arian*, 308 F. Supp.2d 1322, 1356 (M.D. Fl. 2004) (footnotes omitted).

In the new version of Paragraph 29, the ownership interests subject to the purported extortionate scheme are inherently vague as alleged, leading to the obvious conclusion that, in essence, the government's theory is one of sovereignty, not tangible properties. Despite the government's superficial attempt to allege extortion as to property, it is clear that the nebulous concept of sovereignty is the subject of the alleged extortionate scheme. This point is bolstered by the threats that the Defendants are alleged to have made in Paragraph 29, all of which refer to "Palestine," "our land," "our Palestinian land," etc., and which indicate that the underlying conflict is political in nature and cannot be the subject of criminal extortion laws in the United Stated. The Palestinian-Israeli dispute at issue here is purely political, and this is underscored by the fact that there are no allegations here that any of the defendants were involved in allegedly extortionate activity for pecuniary gain.[1]

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[1]Even though, in response to the Court's concerns, the government has distinguished the State of Israel from the Occupied Territories (misleadingly referred to as the "Territories") as the subject of the alleged extortionate scheme, such a distinction is of no legal consequence, since the State of Israel has no officially declared borders. (Doc. 636, at 3, ¶ 4). The fact that it is impossible

Further, as with the previous Indictment, the Superseding Indictment fails to allege that the current owners of the property at issue lose legal title in any way or, for that matter, that the defendants sought to obtain such legal title. Also, taking the entirety of the allegations in Paragraph 29 in the light most favorable to the government, there is nothing indicating that the alleged extortionate scheme involves an economic component.

**B. Counts 12-16 and 18-21**

Counts Five through Twenty-One allege that the Defendants, in violation of the Travel Act, 18 U.S.C. §§ 1952(a)(2) and (a)(3):

> did knowingly and willfully use a facility as described below in interstate and foreign commerce with the intent to (a) commit any crime of violence to further any unlawful activity, that is, *extortion* and money laundering, in violation of the laws of the State of Florida and the United States, and, (b) otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, namely *extortion* and money laundering, and thereafter did promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity.

(Doc. 636 at 118) (emphasis added). The Defendants are charged in multiple counts based on certain facsimile or telephone conversations referenced in specified Overt Acts contained in Count One. Mr. Fariz is charged in Counts 12-16 and 18-21, based on Overt Acts 288, 291, 293, 295, 298, 306, 318, 319, and 322.

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to separate the State of Israel from the Occupied Territories, in the view of the Israeli government, further highlights the political nature of the territory at issue and the reality that sovereignty is the actual object of the alleged extortionate scheme.

The same arguments made above with respect to Paragraph 26(b) allegations apply to the extortion allegations in the Travel Act Counts, as outlined in Mr. Fariz's Motion to Quash filed on June 8, 2004. (Doc. 549).[2]

[2]Mr. Fariz hereby reincorporates the arguments made with respect to the Travel Act Counts from his June 8, 2004 submission to the Court.

WHEREFORE, Defendant, Hatim Naji Fariz, respectfully requests that this Honorable Court quash paragraph 26(b) of the Superseding Indictment and the subsequent extortion allegations contained in Counts 12-16 and 18-21 of the Superseding Indictment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29th day of October, 2004, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Wadie E. Said
Wadie E. Said
Assistant Federal Public Defender